Public Prosecutor v Mohamad bin Sabu

HIGH COURT (PULAU PINANG) — CRIMINAL APPEAL NO 41–22 OF 2011
ZAMANI A RAHIM J
5 AUGUST 2011

Criminal Law — Obstructing public servant in discharge of public functions — Appeal against acquittal — Whether essential ingredients of offence established — Whether prosecution failed to establish prima facie case — Whether charge against respondent proven beyond reasonable doubt — Whether magistrate erred in its factual findings — Whether circumstances warranted interference — Penal Code ss 39 & 186

Criminal Procedure — Charge — Defective charge — Obstructing public servant in discharge of public functions — Absence of word 'voluntarily' and 'in the discharge of his public functions' in charge — Whether charge substantially defective as no offence disclosed — Whether curable under s 422 of the Criminal Procedure Code

Words and Phrases — 'Voluntarily' — Whether indicates requirement of mens rea — Penal Code ss 39 & 186

The respondent was charged with an offence under s 186 of the Penal Code ('Code') for obstructing Supt Mohd Nasir bin Salleh, a public servant, in the discharge of his public functions, on serving the warrant of arrest issued by the Magistrate's Court, Kuala Lumpur against the respondent. The respondent's case was tried together with nine other accused persons. At the close of the prosecution's case, the respondent and nine other co-accused were acquitted and discharged without calling for their defence as no prima facie case had been made out against them. The learned trial magistrate grounded his acquittal of the respondent at the close of the prosecution's case on the question of credibility of SP10, the key witness for the prosecution pertaining to the warrant of arrest. The prosecution was dissatisfied with the respondent's acquittal, hence this appeal. However, there was no appeal by the prosecution in respect of the acquittal of nine other accused persons.

Held, affirming the acquittal of the respondent:

(1) Section 186 required mens rea of the accused to be established before the respondent can be found guilty of an offence under the section. The

section requires that obstruction must be voluntarily made. This involves the element of mens rea or mental element. Further, the use of the word or expression 'intended or knew or had reason to believe' in the definition of 'voluntarily' in s 39 of the Code, indicates beyond doubt the requirement of mens rea in an offence under s 186 (see paras 12 & 16).

(2) There was clearly a failure to incorporate the mens rea that the respondent voluntarily obstructed a public servant and also an obvious omission of the expression 'in the discharge of his public functions' which form two essential ingredients of the offence. As these are essential ingredients of the offence under s 186, omission to state those ingredients in the charge was therefore fundamentally defective and the defect was not curable under s 422 of the Criminal Procedure Code (see paras 20 & 28).

(3) The learned trial magistrate, had doubt about the legality of the warrant of arrest issued against the respondent and for the benefit of such doubt, the learned trial magistrate exercised it in favour of the respondent. Further, there were also discrepancies in the evidence of SP10 and SP11 pertaining to the said warrant of arrest. The learned trial magistrate had made factual findings that the evidence of SP10 was difficult to believe. In other words, SP10 was not a credible witness. On this positive finding on the issue of credibility of SP10, this court would be slow to interfere with such findings as this court did not have the benefit of an audio-visual advantage of seeing and hearing SP10 giving viva voce evidence in court that was exclusively enjoyed by the learned trial magistrate. In the light of the learned trial magistrate's factual findings in which questions of credibility are involved, this court affirmed the learned trial magistrate's decision that the prosecution had failed, at the close of its case, to establish a prima facie case against the respondent (see paras 30 & 36).

[Bahasa Malaysia summary

Responden dituduh dengan kesalahan di bawah s 186 Kanun Keseksaan ('Kanun') kerana menghalang Supt Mohd Nasir bin Salleh, seorang penjawat awam, semasa melaksanakan tugas awamnya, menyerahkan waran tangkap yang dikeluarkan oleh Mahkamah Majistret, Kuala Lumpur terhadap responden. Kes responden dibicarakan bersama sembilan tertuduh yang lain. Di akhir kes pihak pendakwaan, responden dan sembilan tertuduh bersama yang lain dilepaskan dan dibebaskan tanpa dipanggil membela diri kerana kes prima facie tidak dibuktikan terhadap mereka. Majistret perbicaraan yang bijaksana mengasaskan pembebasan responden di akhir kes pendakwaan kepada persoalan kebolehpercayaan SP10, saksi utama bagi pihak pendakwaan berkaitan dengan waran tangkap tersebut. Pihak pendakwaan tidak berpuashati dengan pembebasan responden, maka rayuan ini. Walau

A bagaimanapun, tidak ada rayuan oleh pihak pendakwaan berkaitan dengan pembebasan sembilan tertuduh yang lain.

Diputuskan, mengesahkan pembebasan responden:

B (1) Seksyen 186 memerlukan mens rea tertuduh dibuktikan sebelum responden boleh dikatakan bersalah bagi kesalahan di bawah seksyen tersebut. Seksyen tersebut memerlukan bahawa penghalangan dibuat secara sukarela. Ini membabitkan elemen mens rea atau unsur minda. Selanjutnya, penggunaan perkataan atau ungkapan 'intended or knew or C had reason to believe' dalam definisi 'voluntarily' dalam s 39 Kanun, menunjukkan melampaui keraguan adalah keperluan mens rea di dalam kesalahan di bawah s 186 (lihat perenggan 12 & 16).

(2) Jelas terdapat kegagalan dalam menggabungkan mens rea bahawa responden secara sukarela menghalang penjawat awam dan juga D peninggalan yang jelas ungkapan 'in the discharge of his public functions' yang membentuk dua isi penting kesalahan tersebut. Oleh sebab ini adalah isi penting dalam kesalahan di bawah s 186, peninggalan untuk menyatakan isi tersebut di dalam pertuduhan adalah dengan itu kecacatan yang asas dan kecacatan tersebut tidak boleh diperbetulkan di E bawah s 422 Kanun Prosedur Jenayah (lihat perenggan 20 & 28).

(3) Majistret perbicaraan yang bijaksana, mempunyai keraguan terhadap kesahan waran tangkap yang dikeluarkan terhadap responden dan bagi faedah keraguan tersebut, majistret perbicaraan yang bijaksana F melaksanakannya dengan memihak kepada responden. Selanjutnya, juga terdapat kepincangan di dalam keterangan SP10 dan SP11 berkaitan dengan waran tangkap tersebut. Majistret perbicaraan yang bijaksana telah membuat penemuan fakta bahawa keterangan SP10 sukar dipercayai. Dalam perkataan lain, SP10 bukan saksi yang boleh G dipercayai. Atas penemuan positif ini berkaitan dengan isu kebolehpercayaan SP10, mahkamah ini akan sukar campurtangan dengan penemuan sedemikian kerana mahkamah ini tidak mempunyai faedah kesempatan audio-visual melihat dan mendengar SP10 memberikan keterangan *viva voce* di mahkamah yang secara eksklusif H dinikmati oleh majistret perbicaraan yang bijaksana. Melihatkan penemuan fakta oleh majistret perbicaraan yang bijaksana di mana persoalan kebolehpercayaan adalah berkaitan, mahkamah ini mengesahkan keputusan majistret perbicaraan yang bijaksana bahawa pihak pendakwaan telah gagal, di akhir kesnya, untuk membuktikan I suatu kes prima facie terhadap responden (lihat perenggan 30 & 36).]

Notes

For cases on criminal law in general, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1–3335.

For cases on defective charge, see 5(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1178–1213.

Cases referred to

Aszahaddi bin Abu Hassan lwn Pendakwa Raya [2011] 6 MLJ 20; [2011] 6 CLJ 155, CA (refd)
Aw Yang Kee Chuan v Pendakwa Raya [1992] 1 CLJ (Rep) 398, HC (refd)
Basri Md Desa v PP [2011] 1 CLJ 884, HC (refd)
Datuk Tiah Thee Kian v PP and another appeal [2002] 1 MLJ 585, HC (refd)
PP v Mohd Azam bin Basiron & Anor [2011] 3 MLJ 741; [2010] 9 CLJ 1, CA (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications [2009] 6 MLJ 354, FC (refd)
Takrip dan Sembilan Belas Orang Yang Lain v Pejabat Imigresen Negeri Melaka [2004] MLJU 359; [2004] 1 LNS 305, HC (refd)
Tan Teck Yam v PP [1968] 1 MLJ 57 (refd)
Tumlong Kuandi v PP [1982] 1 MLJ 95 (refd)
Wan Marzuki bin Wan Abdullah v PP [2009] 1 AMR 773, CA (refd)
Willmott v Attack [1976] 3 All ER 794, QBD (refd)

Legislation referred to

Criminal Procedure Code ss 40(1),, 422, Second Schedule, Form 2
Evidence Act 1950 s 114(e)
Immigration Act s 56(1)(d)
Penal Code ss 39, 186, 411
Police Act 1964 [UK] s 51(3)
Subordinate Courts Act 1948

Suhaimi bin Ibrahim (Head of Prosecution) for the prosecution.
Mohamed Hanipa Maidin (Aminudin Zulkifli with him) (Yusnita Yusoff, Mohamed & Partners) for the respondent.

Zamani A Rahim J:

[1] The respondent was charged with an offence under s 186 of the Penal Code vide Arrest Case No 83–304 of 2008. The charge reads as follows:

> Bahawa kamu pada 9hb Disember 2007, jam lebih kurang 7.45 malam, di hadapan Plaza Tol (PLUS) Bukit Tambun, laluan keluar lebuhraya PLUS (Kuala Lumpur-Pulau Pinang), di dalam Daerah Seberang Perai Selatan, dalam Negeri Pulau Pinang, telah menghalang penjawat awam, iaitu Supt. Mohd Nasir Bin Salleh dalam melaksanakan waran tangkap terhadap kamu yang di keluarkan oleh Mahkamah Majistret Jalan Duta, Kuala Lumpur: rujuk 239-07, yang mana pegawai

A polis ini adalah sebagai penjawat awam yang di beri kuasa menyampaikan waran tangkap itu terhadap kamu seperti yang telah diperuntukan kuasa di bawah Seksyen 40(1) Kanun Acara Jenayah (Akta 953). Oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 186 Kanun Keseksaan.

B

[2] The respondent's case was tried together with nine other accused persons vide Arrest Case No 83–303 of 2008. At the close of the prosecution's case, the respondent and nine other co-accused were acquitted and discharged without calling for their defence as no prima facie case has been made out against them.

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[3] The prosecution was dissatisfied with the respondent's acquittal, hence this appeal (Arrest Case No 83–304 of 2008). However, there was no appeal by the prosecution in respect of the acquittal of nine other accused persons vide Arrest Case No 83–303 of 2008.

D

[4] In this appeal, there are ten grounds listed in the petition of appeal. They are as follows:

(a) Tuan majistret telah terkhilaf dari segi fakta dan undang-undang dalam memutuskan pihak perayu telah gagal membuktikan kes prima facie atas pertuduhan terhadap pihak penentang.

E

(b) Tuan majistret telah terkhilaf dari segi fakta dan undang-undang kerana gagal memberikan pertimbangan yang wajar ke atas keseluruhan keterangan kes pendakwaan dan jika ini dilakukan mahkamah sudah semestinya mendapati bahawa semua elemen pertuduhan di bawah s 186 Kanun Keseksaan terhadap penentang telah berjaya dibuktikan.

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(c) Tuan majistret telah terkhilaf dari segi fakta dan undang-undang kerana gagal menggunapakai prinsip di dalam kes *Tan Teck Yam v Public Prosecutor* [1968] 1 MLJ 57 bagi membuat ketentuan sama ada pihak perayu telah berjaya atau tidak membuktikan pertuduhan terhadap penentang.

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(d) Tuan majistret telah terkhilaf dari segi fakta dan undang-undang dalam dapatannya bahawa telah wujud keraguan mengenai waran tangkap yang dikeluarkan padahal keterangan saksi pendakwaan terutamanya SP11 yang menerangkan tentang pengeluaran waran tangkap ini oleh Majistret Jalan Duta Kuala Lumpur adalah jelas dan tanpa keraguan.

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(e) Tuan majistret telah terkhilaf dari segi fakta dan undang-undang kerana gagal mengambilkira bahawa waran tangkap yang dikemukakan di mahkamah adalah tulen, teratur dan menepati s 38 dan Borang 2 Jadual Kedua, Kanun Tatacara Jenayah di mana waran itu adalah dalam bentuk bertulis, mempunyai tandatangan dan mempunyai meterai mahkamah sepertimana yang diperuntukkan oleh Akta Mahkamah Rendah 1948.

I

(f) Tuan majistret telah terkhilaf dari segi fakta dan undang-undang kerana terlampau memberikan penekanan kepada faktor yang tidak material iaitu faktor ketiadaan tarikh dan ketiadaan nama majistret padahal faktor-faktor itu bukanlah menjadi syarat kesahihan (*legality*) waran tangkap tersebut.

(g) Tuan majistret telah terkhilaf dari segi fakta dan undang-undang kerana gagal membuat penilaian sewajarnya tentang pemakaian s 422 Kanun Tatacara Jenayah jika sekiranya beliau berpendapat adanya unsur-unsur kesilapan, ketinggalan ataupun luar aturan (*irregularity*) di dalam pengeluaran waran tangkap itu. Beliau juga sewajarnya membuat dapatan sama ada penentang telah prejudis atau terdapat kegagalan keadilan (*failure of justice*) ke atas penentang berkaitan hal kesilapan, ketinggalan dan luar aturan ini.

(h) Tuan majistret telah terkhilaf dari segi fakta dan undang-undang apabila gagal mengambilkira pemakaian s 114(e) Akta Keterangan dalam menilai kebolehterimaan (*admissibility*) keterangan SP11 mengenai ID8, ID9 dan P12.

(i) Tuan majistret telah terkhilaf dari segi fakta dan undang-undang apabila membuat dapatan bahawa wujudnya percanggahan material antara saksi pendakwaan SP10 dan SP11 padahal perbezaan keterangan mengenai jumlah waran tangkap adalah bukan satu percanggahan yang material. Malah ID8, ID9 dan P12 adalah dokumen yang sama jika dirujuk kepada nombor rujukan waran tangkap iaitu 239–07.

(j) Tuan majistret telah terkhilaf dari segi fakta dan undang-undang apabila gagal memberikan sebab dan alasan di dalam menolak keterangan SP10.

[5] The facts are briefly as follows.

[6] On 9 December 2007, Supt Mohd Nasir bin Sailed, SP10, *Timbalan Ketua Bahagian Siasatan Jenayah Pulau Pinang* had received a fax copy of a warrant of arrest vide reference 239–07, ID8 issued by the Magistrate's Court Jalan Duta, Kuala Lumpur against the respondent.

[7] A police road block was set up at Plaza Tol Bukit Tambun where a Naza Ria motorcar, bearing registration No DAS 8815 with the respondent as one of the passengers was detained there. The police could not get close to the said Naza Ria motorcar as they were blocked by several people.

[8] SP10 was contacted and he soon came to the scene. He took over the task to arrest the respondent. SP10 also failed to get close to the respondent's motorcar as several people caused the obstruction. SP10 caused these people who surrounded the respondent's motorcar to be arrested. Only then SP10

managed to get close to the respondent's motorcar. SP10 placed the warrant of arrest on the screen of the motorcar. The respondent remained quiet in the motorcar. He refused to open its door.

[9] With the assistance of/Inspector Wan Kamal, SP5, the window screen of the motorcar was smashed. It was broken. Thereafter the respondent surrendered himself to the police. The respondent was then escorted to Kuala Lumpur.

[10] Having gone through the records of appeal, the case may expeditiously be disposed off on the ground that the charge against the respondent was defective. The respondent was charged with an offence under s 186 of the Penal Code which reads as follows:

> Obstructing public servant in discharge of his public functions
>
> 186 Whoever *voluntarily obstructs* any public servant *in the discharge of his public functions*, shall be punished with imprisonment for a term which may extend to two years or with fine which may extend to ten thousand ringgit or with both.

[11] According to Ratanlal & Dhirajlal's *Law of Crimes* Vol 1 (24th Ed), at p 767, there are two essential ingredients of the offence under s 186. They are:

(a) *voluntary obstruction* to a public servant; and

(b) such obstruction must be *in the discharge of public functions* of such public servant.

[12] Therefore, s 186 requires mens rea of the accused to be established before the respondent can be found guilty of an offence under the section. The section requires the obstruction must be voluntarily made. This involve the element of mens rea or mental element. In Ratanlal & Dhirajlal's *Law of Crimes*, at para 15 at p 777 said:

> 15 Mens rea — In order to constitute an offence under this section, the obstruction must be 'wilful'. It is, therefore, not enough to prove obstruction by the accused to a public servant but it must also be proved that the *intention* was encompassed with some sort of hostility towards such public servant.

[13] In *Tan Teck Yam v Public Prosecutor* [1968] 1 MLJ 57, Raja Azlan Shah J (as HRH then was) had dealt with the elements of s 186, including the term of 'obstruction' and 'voluntarily'. It is this.

> For an offence under s 186 of the Penal Code the prosecution has to prove the following: (1) that there was obstructing of a public servant, (1) that the public servant was at that time discharging his public function, and (3) *that the person*

obstructing did so voluntarily. It is in my view clear that to obstruct under s 186 of the Penal Code is to do an act which makes it more difficult for a public servant to carry out his duties. I take that definition of 'obstruction' from the case of *Hinchliffe v Sheldon*. It is therefore quite clear that the appellant was making it more difficult for the chief assistant district officer to discharge his public function and that the said officer was at that time involved in discharging his public functions. *The only remaining element of the alleged offence is whether the obstruction was voluntary*. That brings me to s 39 of the Penal Code which defines 'voluntarily' as,

> A person is said to cause an effect 'voluntarily' when he causes it by means whereby he *intended* to cause it, or by means which, at the time of employing those means, he *knew* or *had reason to believe* to be likely to cause it.
>
> The definition of the term 'voluntarily' bears resemblance to the definition of 'wilfully' current in the English law. (See Ratanlal & Dhirajlal's *Law of Crimes*, (21st Ed) at p 82). In *Rice v Connolly*, Lord Parker CJ said:
>
> 'Wilful' in this context in my judgment means not only 'intentional' but also connotes something which is done without lawful excuse.

[14] The definition of 'voluntarily' was apparently borrowed from that of 'wilfully' prepared by the commissioners on the criminal law of England which reads:

> A hurt, damage or other evil consequence of an act shall be deemed to have been caused *wilfully* where the doer of the act intended such consequence to result or knew or believed that it was likely to result from his act, or where knowing or apprehending that such consequence would probably result from his act, he willfully incurred the risk of causing it.

[15] In England the Police Act 1964 s 51(3) reads 'Any person who resists or *wilfully obstructs* a constable in the execution of his duty, or a person assisting a constable in the execution of his duty shall be guilty of an offence '. On the term 'wilfully', May J in *Willmott v Attack* [1976] 3 All ER 794 said at p 800 in the following words:

> The word 'wilfully' has been inconsistently interpreted in various acts which define criminal offences. In some cases it has been held to import a requirement of mens rea. In other Acts it has not. The question in the present case is whether in the relevant section of the Police Act 1964 mens rea is imported by the use of the term 'wilfully' or not.
>
> I agree with *Croom-Johnson J* that when one looks at the judgment of *Darling J* in the earlier case of *Betts v Stevens*, where he said: The gist of the offence to my mind lies in the *intention* with which the thing is done', it is clear that 'wilfully' in this particular Act does import a requirement of *mens rea*.

[16] Having regard to the above authorities, in particular the use of the word

or expression 'intended or knew or had reason to believe' in the definition of 'voluntarily' in s 39 of the Penal Code, indicates beyond doubt the requirement of mens rea in an offence under s 186. Similarly the term 'wilfully obstructs' in s 51(3) of the English Police Act 1964 does import a requirement of mens rea.

[17] Now let us visit the charge in the instant case. Before I proceed further, in order to be fair to the defence, learned counsel did submit in a lukewarm fashion, bereft of any authorities on the absence of the word 'voluntarily' and the expression 'in the discharge of his public functions' in the charge. As these are essential ingredients of the offence under s 186, omission to state those ingredients in the charge has resulted the charge being seriously defective. Learned deputy chose not to reply to the defence submission and likewise the learned trial magistrate did not consider and address his mind on the issue of defective charge in his grounds of decision.

[18] Upon a proper perusal of the charge herein, there is clearly a failure to incorporate the mens rea that the respondent voluntarily obstructed a public servant and also an obvious omission of the expression 'in the discharge of his public functions' which form two essential ingredients of the offence. The offence under s 186 is not a crime of strict liability where the presumption of mens rea is displaced: see *Tumlong Kuandi v Public Prosecutor* [1982] 1 MLJ 95.

[19] One of the most important general principles of criminal liability is embodied in the Latin maxim 'actus non facit reum, nisi mes sit rea' which means 'an act does not make a man guilty of a crime, unless his mind is also guilty. Put simply, to be criminally liable, the mens rea and the actus reus must be concurrent.

[20] Coming back to the charge in this case, failure to incorporate the word 'voluntarily' in the charge which denotes the mens rea or mental element of the offence, the charge is therefore substantially defective because no offence has been disclosed under s 186.

[21] The importance of incorporating an expression or similar phrase involving mens rea or mental element which is an essential ingredient of the offence may be illustrated in *Aw Yang Kee Chuan v Pendakwa Raya* [1992] 1 CLJ (Rep) 398 where it was held the element of *knowledge* or *reasonable belief* must be stated in the charge as it was an essential ingredient of the offence. Without knowledge or belief, no offence is disclosed or the offence is not complete. In his opening judgment at p 399, Abdul Aziz Mohammad J said:

> Terlebih dahulu saya perlu menegur bahawa pertuduhan pilihan terhadap perayu, iaitu pertuduhan di bawah mana dia disabitkan, tidak menyebut satu unsur penting bagi kesalahan di bawah s 411 Kanun Keseksaan, iaitu unsur *mengetahui atau mempunyai sebab untuk mempercayai barang yang berkenaan itu barang curi.*

Majistret-majistret hendaklah mengambil berat memastikan sesuatu pertuduhan itu menyebut setiap unsur (*ingredient*) bagi sesuatu kesalahan oleh kerana, jika mana-mana unsur tidak disebut, pertuduhan itu akan gagal memperlihatkan kesalahan.

[22] This part of the judgment is fortified by my earlier decision in *Basri Md Desa v Public Prosecutor* [2011] 1 CLJ 884. Based on the authority of *Takrip dan Sembilan Belas Orang Yang Lain v Pejabat Imigresen Negeri Melaka* [2004] MLJU 359; [2004] 1 LNS 305, an inclusion of mens rea under s 56(1)(d) of the Immigration Act, namely, 'knew or had reasonable grounds for believing' in the charges are of fundamental importance. Omission to state the mens rea, the charges are wholly defective and liable to be dismissed.

[23] In *Basri Md Desa*, I had occasion to refer to an offence of retaining stolen property under s 411 of the Penal Code in the Ratanlal & Dhirajlal's *Law of Crimes* at para 38 under the heading 'Charge' which requires the offence under s 411 to set forth in the charge the mens rea that ' 'the accused' knew or had reason to believe that the property he received was stolen property'. The incorporation of the mens rea is further illustrated in a specimen charge which I have produced in *Basri Md Desa*'s case.

[24] The second ingredient of the offence under s 186 reads 'such obstruction must be in the discharge of public functions of such public servant'. This expression is also not mention or missing from the charge. The relevant part of the charge states, inter alia, ' … dalam melaksanakan waran tangkap terhadap kamu yang dikeluarkan oleh Mahkamah Majistret Jalan Duta, Kuala Lumpur rujuk 239-07, yang mana pegawai polis ini (i.e. Supt. Mohd. Nasir bin Salleh) adalah sebagai penjawat awam yang diberi *kuasa* menyampaikan waran tangkap itu terhadap kamu seperti yang *diperuntukkan kuasa di bawah* s 40(1) Kanun Acara Jenayah (Akta 953)'. The charge says that Supt Mohd Nasir bin Salleh, a public servant was conferred with the power to serve (should read 'execute') the warrant of arrest No 239–07 issued by the Magistrate's Court, Jalan Duta, Kuala Lumpur on the respondent in pursuant of s 40(1) of the Criminal Procedure Code ('CPC'). This averment is incorrect or inaccurate and misconceived.

[25] The above averment is obviously intended to fulfil the second ingredient which is totally inconsonant with the offence under s 186. The second ingredient relates to a discharge of *public functions* by a public servant. A public function is not defined in the Penal Code. According to the Federal Court case of *Sulaiman bin Takrib v Kerajaan Negeri Terengganu (Kerajaan Malaysia, intervener) and other applications* [2009] 6 MLJ 354, Abdul Hamid Mohamad CJ in his farewell judgment said at p 370:

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> Section 186 makes it an offence for anybody to voluntarily obstruct a public servant in the discharge of his public functions. What is a 'public function' is not defined. First, it is up to the officer to decide whether, in his view, what he was doing was a public function or not. In the final analysis, it is for the court to decide.

B

[26] In the upshot, the second ingredient which is described in the charge in this case is inaccurately and imprecisely stated. In *Datuk Tiah Thee Kian v Public Prosecutor and another appeal* [2002] 1 MLJ 585, Mohd Hishamudin J said at p 599 as follows:

C

> The accused in a criminal trial should have sufficient notice of what is alleged against him so as to enable him to prepare his defence. So long as that requirement is satisfied the law is satisfied. The principle of justice was in fact emphasised by Hepworth J in *Public Prosecutor v Teoh Choon Teck* [1963] MLJ 34 at p 34 where he said:

D

> If there be any one principle of criminal law and justice clearer and more obvious than all others, it is that the offence imputed must be positively and precisely stated, so that the accused may certainly know with what he is charged, and be prepared to answer the charge as best he may.

E

[27] A proper and correct charge for an offence to voluntarily obstruct a public servant in the discharge of his public functions under s 186 is exemplify in the book entitled 'Pendakwaan Jenayah Di Mahkamah Rendah', Edisi Kedua by Teo Say Eng at p 429 as follows:

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> Bahawa kamu, pada atau di sekitar … haribulan … di … telah dengan *sukarela menghalang* seorang penjawat awam, iaitu … *dalam menjalankan fungsi awamnya* dan bahawa kamu adalah dengan ini melakukan kesalahan yang boleh dihukum di bawah seksyen 186 Kanun Keseksaan.

G

[28] Having regard to the above discussion, since the term 'voluntarily' together with the phrase or expression 'in the discharge of his public functions' which are both essential ingredients of the offence were omitted from the charge, the charge is therefore fundamentally defective and the defect is not
H curable under s 422 of the Criminal Procedure Code. In *Public Prosecutor v Mohd Azam bin Basiron & Anor* [2011] 3 MLJ 741; [2010] 9 CLJ 1, in discussing the charge, Suriyadi Halim Omar JCA (as he then was) said, inter alia:

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> For a prima facie case to be established successfully, in order for the defence to be called, the prosecution must prove the *main ingredients of the charge.*

[29] On this ground alone, the charge herein against the respondent must be dismissed.

[30] However, the learned trial magistrate grounded his acquittal of the respondent at the close of the prosecution's case on the question of credibility of SP10, the key witness for the prosecution pertaining to the warrant of arrest. This is how the learned trial magistrate dealt in his grounds of judgment:

> Keterangan SP10 adalah merupakan keterangan yang penting kerana beliau adalah pengadu di dalam kes ini. Mengikut keterangan SP10 di mahkamah, beliau diarahkan untuk melaksanakan tugas rasminya iaitu melaksanakan tangkapan ke atas penama Mohamad Sabu dengan menyerahkan satu waran tangkap. Walau bagaimanapun, pada tahap ini pihak pembelaan mempertikaikan tentang *kesahihan waran tangkap* yang dikemukakan kerana tidak terdapat tarikh serta nama majistret yang keluarkan waran tangkap tersebut. Di atas isu ini, mahkamah melihat kepada tiga waran tangkap yang dikemukakan di mahkamah yang ditandakan sebagai ID8, ID9 dan P12. Keterangan SP10 menyatakan terdapat dua waran tangkap yang dikeluarkan oleh majistret. Jika dilihat pada keterangan SP11 beliau menyatakan bahawa beliau hanya memohon satu waran tangkap sahaja dan menerima satu waran tangkap sahaja pada 4 December 2007 iaitu (P12). Tambahan keraguan wujud pada ID9 yang bertarikh 7 December 2007. Oleh yang demikian mahkamah berpendapat:
>
> (a) wujudnya keraguan pada waran tangkap yang dikemukakan di mahkamah dan manfaat ini harus memihak kepada semua tertuduh; dan
>
> (b) wujudnya percanggahan keterangan yang material di antara saksi pendakwaan (SP10 dan SP11). Oleh itu, keterangan SP10 sukar diperayai.

[31] The learned magistrate went on to dispose the case in the following words:

> Berdasarkan penilaian maksimum (*maximum evaluation*) terhadap kes pihak pendakwaan, mahkamah telah memutuskan bahawa kes prima facie gagal dibuktikan oleh pihak pendakwaan. Berikutnya, OKT pertama hingga kesepuluh dilepaskan dan dibebaskan tanpa dipanggil membela diri.

[32] Having carried out maximum evaluation of the prosecution evidence the learned trial magistrate has grounded the respondent's acquittal on two grounds, namely:

(a) there was doubt about the legality of the warrant of arrest which was tendered in court and the benefit of doubt must be given to the respondent; and

(b) there were contradictions in the evidence of SP10 and SP11 who were material prosecution witnesses, as a result of which SP10's evidence was difficult to believe.

[33] According to the learned trial magistrate, firstly, he had doubt about the legality of the warrant of arrest issued against the respondent and the benefit of

such doubt, the learned trial magistrate exercised it in favour of the respondent. Secondly, there were also discrepancies in the evidence of SP10 and SP11 pertaining to the said warrant of arrest. The learned trial magistrate had made factual findings that the evidence of SP10 was difficult to believe. In other words, SP10 was not a credible witness. On this positive findings on the issue of credibility of SP10, I hold that the appellate court, as I am now, should be slow to interfere with such findings as I do not have the benefit of an audio-visual advantage of seeing and hearing SP10 giving *viva voce* evidence in court that are exclusively enjoyed by the learned trial magistrate. In the Court of Appeal case of *Wan Marzuki bin Wan Abdullah v Public Prosecutor* [2009] 1 AMR 773, Gopal Sri Ram JCA (as he then was said):

> There is clear authority for the proposition that in an appeal of this nature which turns on questions of fact particularly in relation to issues of *credibility*, this court will be reluctant to interfere with the findings made by the primary trier of fact. We need go no further than to quote the following passage from the judgment of Shaik Daud JCA in *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 647; [2001] 3 AMR 2611:
>
> > In the present case the learned judge concluded that there were discrepancies but those discrepancies were not material ones. Since this involved the *credibility of witnesses*, we held that the learned judge was a better person to decide and an appellate court ought not to interfere with such findings.

[34] Similarly in the Federal Court case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457, Gopal Sri Ram JCA (as he then was) said:

> Now, it is settled law that it is no part of the function of an appellate court in a criminal case or indeed any case — to make its own findings of fact: That is a function exclusively reserved by the law to the trial court. The reason is obvious. An appellate court is necessarily fettered because it lacks the audio-visual advantages enjoyed by the trial court.

[35] In similar vein, in a recent Court of Appeal case of *Aszahaddi bin Abu Hassan lwn Pendakwa Raya* [2011] 6 MLJ 20; [2011] 6 CLJ 155, Ahmad Maarop JCA said at p 178 as follows:

> Untuk menilai kebolehpercayaan saksi-saksi YA hakim bicara berada dalam keadaan yang lebih baik dari kami yang menghakimkan kes ini di peringkat rayuan dengan bergantung kepada keterangan-keterangan yang ada dalam rekod rayuan (lihat *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644; [2000] 3 CLJ 289). Dalam *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 di ms 113 Mahkamah Persekutuan menyatakan:
>
> > The Privy Council said in *Caldeira v Gray* that the functions of an appellate court, when dealing with a question of fact, and a question of fact in which questions of *credibility* are involved, are limited in their character and scope, and

that in an appeal from a decision of a trial judge based on his opinion of the *trustworthiness of witnesses* whom he has seen, an appellate court must in order to reverse, not merely entertain doubts whether the decision below is right but be convinced that it is wrong.

[36] In the light of the learned trial magistrate's factual findings in which questions of credibility are involved, I do not intend to interfere. I hereby affirm the learned trial magistrate decision that the prosecution has failed, at the close of its case, to establish a prima facie case against the respondent.

[37] Accordingly, on this ground too, the respondent is entitled to an acquittal without having to call for his defence.

Respondent's acquittal affirmed.

Reported by Ashgar Ali Ali Mohamed